T MOHAN ELLEN & ORS

v.

PENTADBIR TANAH DAERAH, PETALING

HIGH COURT MALAYA, SHAH ALAM
ABU SAMAH NORDIN J
[ORIGINATING SUMMONS NO: MT2-25-6-99]
25 JUNE 1999

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Whether proper remedy - Circumstances in which certiorari to be granted - Whether exceptional circumstances existed*

LAND LAW: *Adverse possession - State land - Whether occupants have any right in law or equity - National Land Code, ss. 48, 425, 426A*

This was an application by the applicants for an order of *certiorari* to quash the respondent's decision to demolish their houses or evict them from their homes or premises pursuant to eviction notices served on them.

The applicants were apparently squatters occupying state land, known as Kampung Sungai Nipah ('KSN'). The applicants claimed that when they initially resided in KSN, it was then a forest area and a burial ground. They alleged that one Mr Michael Chen, who was then a member of Parliament had promised them that he would obtain the land approval from the State Authority on their behalf. Subsequently the applicants discovered that the lands they had been residing in had been approved for alienation to Tanjung Istimewa Sdn Bhd ('TISB'). TISB had entered into an agreement with Million Horizons Development Sdn Bhd ('MHDB') for development of the land into shophouses and service apartments. Several meetings were then held between the applicants, TISB, MHDB and the State Assemblyman for the constituency and some other politicians – culminating in an offer from TISB and MHDB to all the residents including the applicants for compensation and purchase of low costs flats. The applicants were dissatisfied with the location of the low-cost flats and proceeded to lodge police reports against the State Assemblyman for Subang Jaya. Subsequent meetings were held and in the meeting held on 5 February 1999, the respondent agreed to defer any further action until after 5 March 1999. It was this decision that the applicants now seek to quash by an order of *certiorari* on grounds of unreasonableness, discrimination, lack of *locus standi, ultra vires,* and *mala fide*.

Among the issues for consideration was whether an order of *certiorari* was the proper remedy.

Held:

[1] On the facts, there was no such discrimination within the meaning of art. 8 of the Federal Constitution. In fact the applicants were treated better than the other squatters. The respondent had been fair in that he had given the applicants the right to be heard and also acceded to their requests for an extension of time.

[2] Section 78(3) of the National Land Code ('the NLC') makes it clear that the alienation of State Land shall take effect upon the registration of a registered document of title and notwithstanding that its alienation had been approved by the State Authority, the land shall remain state land until that time.

[2a] On the facts of the case, although the land had been alienated to TISB, it had not been registered in its name. The land therefore remained state land and therefore the respondent, being the Land Administrator had the *locus standi* to deal with state land.

[3] Section 48 of the NLC prescribes that no title to state land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever. Section 425 of the NLC makes it an offence for any person who without lawful authority, occupies or erects any building on any state land, reserved land or mining land while s. 426A of the NLC empowers the Land Administrator without warrant, to arrest any person found committing or attempting to commit or abetting the commission of an offence under ss. 425 or 426 and to demolish, destroy or remove any building or take possession in the name of the State Authority of any crop, erected or cultivated on any land in contravention thereof. Considering the facts therefore, the applicants had no right in law and equity over state lands.

[4] *Certiorari* is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather than the final determination of individual rights. The jurisdiction is sometimes referred to as an 'extraordinary' original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary.

[4a] It is not a rigid rule that whenever there is an appeal procedure available to the applicant, he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant, it will only be exercised in very exceptional circumstances.

[4b] The facts disclosed that there were no really exceptional circumstances to justify the court, in exercise of its discretion, to grant an order of *certiorari* to quash the respondent's decision. The applicants therefore should have appealed against the respondent's decision under s. 418 of the NLC.

[Application dismissed.]

Case(s) referred to:

Ahmad Tajuddin v. Suruhanjaya Pelabuhan P Pinang [1997] 2 CLJ 225 ***(refd)***
Cheah Fong Chiew v. Lembaga Jurutera Malaysia [1999] 3 CLJ 242 ***(foll)***
Civil Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***
Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451 ***(foll)***
Government of the State of Negeri Sembilan & Anor v. Yap Chong Lan & Ors/ Lesco Development Corp Sdn Bhd v. Yap Chong Lan & Ors [1984] 2 MLJ 123 ***(foll)***
Kulawante (an infant) v. Government of Malaysia & Anor [1978] 1 MLJ 92 ***(refd)***
Lim Kui Siam & Anor Representing Member of Persatuan Penduduk-penduduk Kawasan Hj Manan, Kluang lwn. Pentadbir Tanah Daerah Kluang [1995] 1 CLJ 846 ***(foll)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sg Gelugor Dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***
Manggai v. Government of Sarawak & Anor [1970] 2 MLJ 41 ***(refd)***
PP v. Khong Teng Khen & Anor [1976] 2 MLJ 166 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(dist)***
Re Low See Kim [1988] 2 CLJ 66 ***(foll)***
Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors [1982] 1 MLJ 313 ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 ***(dist)***

Legislation referred to:

Federal Constitution, art. 8
Immigration Act 1959/1963, ss. 14(5), 59A
National Land Code, ss. 15(1)(g), 48, 78(3), 418, 425, 426A
Rules of the High Court 1980, O. 18 r. 19, O. 53 r. 1(2), (5)

For the applicant - Selva Balan (Susan Joseph); M/s Azman, Joseph & Assoc
For the respondent - Hj Mohd Zawawi Hj Salleh (Nik Suhaimi Nik Sulaiman) State Legal Advisers

Reported by Mariette Peters-Goh

JUDGMENT

Abu Samah Nordin J:

This was an application by the applicants by way of a notice of originating motion for an order of *certiorari* to quash the respondent's decision on 5 February 1999 to demolish their houses or evict them from their houses or premises, built on state lands in Kampung Sungai Nipah, Batu Tiga Shah Alam, after 5 March 1999 pursuant to the eviction notices served on them. The eviction notices required them to vacate the state lands which they had been staying illegally and without permission, within 14 days of the date of the notices. It was not an application to quash the said notices. The original respondent was "Pejabat Tanah/Daerah Petaling" but it was orally amended at the hearing before me to "Pentadbir Tanah Daerah Petaling" after my query as to why the applicants cited the respondent as the "Pejabat Tanah/Daerah Petaling". The learned state legal advisor, who appeared for the respondent, after some hesitation, did not object to the oral application for amendment.

The respondent's decision was contained in a letter dated 8 February 1999 addressed to the first applicant as the chairman of the Action Committee of Kampung Sg. Nipah ("KSN"). To avoid any misapprehension of facts, it had to be stated here that he was only acting as chairman of the Action Committee on behalf of the applicants and not on behalf of all the squatters in KSN. The letter reads as follows:

> PEJABAT DAERAH/TANAH PETALING
> KOMPLEKS PEJABAT KERAJAAN DAERAH PETALING
> NO.9, JALAN SS 16/1,
> 47500 SUBANG JAYA
> SELANGOR DARUL EHSAN
>
> Ruj. Tuan:
> Ruj. Kami: (179)dlm PTDP 3A(DM) 63
> Tarikh: 8hb. Februari 1999.
>
> Encik T. Mohan
> Pengerusi
> Jawatankuasa Bertindak
> Kampong Sungai Nipah
> C10 112 Block 65, Ground Floor
> Seksyen 24, 40000 Shah Alam
> Selangor.

Tuan,

Penanggohan Tindakan Penguatkuasaan Setinggan Sungai Nipah Yang Di Wakili Oleh Tuan.

Adalah saya dengan hormatnya merujuk kepada perkara tersebut di atas.

2. Mesyuarat yang diadakan pada 5 Februari 1999 di pejabat Daerah Petaling yang di pengerusi oleh Pegawai Daerah Petaling telah bersetuju untuk menanggohkan tindakan meroboh/mengosongkan rumah/bangunan setinggan yang tuan wakili sahaja untuk tempoh satu bulan iaitu sehingga pada 5 Mac 1999.

3. Sehubung dengan itu tindakan penguatkuasaan akan dijalankan selepas tarikh tersebut tanpa sebarang notis.

Sekian terima kasih.

'BERKHIDMAT UNTUK NEGARA'
Saya yang menurut perintah,

t.t.
(AB. MALEK B. HJ MOHD AMIN)
Penolong Pentadbir Tanah (Penguatkuasaan)
b.p. Pentadbir Tanah Petaling.

1. Y.B. Tuan Lee Hwa Beng
   ADUN Subang
   Subang Jaya.
2. Pengarah,
   Tanjung Istimewa Sdn. Bhd.
3. Petaling Tanah Petaling
4. KPPD(T)

The meeting on 5 February 1999 referred to in the letter was held at the request of the applicants. It was at this meeting that the respondent agreed not to enforce the eviction notices until after 5 March 1999. The respondent clearly stated in his letter that the said decision was only applicable to the squatters represented by the 1st applicant. The letter made no mention on the fate of the other squatters, who form the majority of the squatters in KSN.

The Background

The applicants were squatters on state lands. They had been residing illegally and without permission on the state lands, in an area what is now known as Kampung Sg. Nipah, District of Petaling, Selangor, along with some other squatters for the past 40 years. According to the survey conducted by the Petaling District Office on 21 and 22 December 1996,

there were 132 squatter families residing in KSN. They had constructed houses and/or structures on the state lands without the permission of the state authority. In addition to this, there were another 55 families who were either relatives of some of the 132 squatter families or tenants. A complete list of the squatter families certified by the village head is exhibited as exh. AM3 in the respondent's affidavit. The actual number of persons residing in the KSN was not made known to the court.

The applicants claimed that when they initially resided in KSN it was then a forest area and a burial ground. They alleged that Mr. Michael Chen, who was then the member of parliament for Bukit Raja had promised them that he would obtain the land approval from the state authority on their behalf.

At present there are about 200 families, including the applicants herein, residing in KSN. The applicants claimed that the government had provided basic amenities such as water, electricity, telephone, roads and community hall (Balai Raya) for the use of the villagers. By providing such amenities the government had impliedly given recognition to KSN and allowed the residents to reside therein.

Sometimes in February 1997, the respondent issued eviction notices to them to vacate their houses within 14 days. The respondent agreed to defer any further action after the applicants sought the assistance of Mr. Lee Hwa Beng, who was the state assemblyman for Subang Jaya. Subsequently, the applicants discovered that the lands they had been residing had been approved for alienation to Tanjung Istimewa Sdn Bhd (TISS). TISB had entered into an agreement with Million Horizons Development Sdn Bhd (MHDB) for development of the land into shophouses and service apartments. Several meetings were then held between the residents of KSN including the applicants, TISB, MHDB and the state assemblyman for the constituency and some other politicians. This culminated in an offer from TISB and MHDB to all the residents, including the applicants for compensation and purchase of low cost flats. The terms of the offer were contained in the letter of acceptance which is reproduced below:

> To: Tanjung Istimewa Sdn Bhd
> Million Horizons Development Sdn Bhd.
> No. 15 Jalan USJ l0/lE
> 47620 Subang Jaya
> Selangor Darul Ehsan
>
> From: Name
> I.C. No.
> House No:
> Date:

Penduduk Rumah Setinggan Di Kampung Sungai Nipah
Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan

With reference to the above captioned, I am pleased to confirm that the following conditions of eviction of my squatter house have been understood and accepted by us:

Option A (Owner)

Satu hati of RM9,000.00 without the allocation of one (1) [ ]
unit of longhouse
and an offer to sell one (1) unit of low cost flat to me.

OR

Option B (Owner)

Sagu hati of RM2,500.00 with the allocation of one (1) unit of [ ]
longhouse and an offer to sell one (1) unit of low cost flat to me.

OR

Option C (Extended Family/Tenant)
An offer to sell one (1) unit of low cost flat to me [ ]

Thank you,

Yours faithfully,

Name:

I.C.

The applicants understood and believed that the low cost flats offered to them would be situated in Bukit Jelutong, in the vicinity of the Shah Alam Stadium and not in Bukit Subang area in Sg. Buloh, as it turned out to be. It was on that understanding that they accepted the offer and opted for either Option A or Option B. Deposits for the low cost flats were paid. They did not however signed the sale and purchase agreements for reasons not disclosed to the court. There was also a feeling of dissatisfaction among those who were not eligible for Option A or B as they were only offered the purchase of low cost flats without any compensation.

The applicants withdrew their acceptances of the said offers when they discovered that the low cost flats would be sited in Kampung Subang in Sg Buloh and not in Bt. Jelutong. They felt cheated and lodged police reports against the state assemblyman for Subang Jaya. The majority of the squatters in KSN had either opted for Option A and vacated the lands or opted for Option B and stayed in the long houses pending the completion of the low cost flats.

On 13 January 1999, the respondent issued fresh eviction notices to all the squatters in KSN to vacate the state lands within 14 days of the date of the notices. On 22 January 1999 a meeting was held between the respondent and the applicants at the request of the latter. As a result of this meeting the respondent promised not to take any further action pending the next meeting.

The next meeting was on 5 February 1999. It was attended by the 1st applicant and 15 others applicants. It was at this meeting that the applicants requested for deferment of the enforcement of the eviction notices. The respondent agreed to defer any further action until after 5 March 1999. It was this very decision and not the eviction notices that the applicants now seek to quash by an order of *certiorari.*

Grounds Of Application

The applicants sought to quash the decision of the respondent as being null and void on the following grounds: unreasonableness, discrimination, *locus standi, ultra vires* and *mala fide*. The grounds were either stated in their statement made pursuant to O. 53 r. 1(2) of the High Court Rules 1980 or in their supporting affidavit. At the hearing before me the learned counsel for the applicants did not pursue with the grounds in respect of *ultra vires* and *mala fide* and conceded in the course of his submission, as we shall see later, that the respondent had the *locus standi* to make the impugned decision.

(i) Unreasonableness

It was submitted that the respondent's decision was unreasonable and irrational because the respondent's decision was only directed at them and not to all the residents of KSN. They claimed that they had to vacate the lands and that their houses would be demolised after 5 March 1999 while the other residents who were also squatters were allowed to stay in KSN without their houses being demolished. The learned counsel contended that the applicants were under such impression or belief because the respondent's letter was vague and unclear. Further the one month's period to vacate was inadequate as it would be difficult for the applicants to find alternative accomodation.

The learned counsel referred to *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 as an authority that the court could review the respondent's decision not only on the ground of procedural impropriety but also on the grounds of illegality and irrationality. Edgar Joseph Jr FCJ, in his majority judgment in that case cited Lord

Diplock's judgment in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374 on the meaning of "irrationality" and "illegality". Lord Diplock, at pp. 410-411 said:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute by those persons, the judges, by whom the judicial power of the state is exerciseable.
>
> By 'irrationality', I mean what can now be succintly referred to as "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ... . 'irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

The respondent, in his affidavit in reply stated that the eviction notices had been issued to all the squatters in KSN on 19 September 1996, 12 March 1997, 20 September 1997 and finally on 13 January 1999. The applicants did not deny these facts. Despite of those notice they refused to vacate the lands. The learned counsel for the respondent pointed out that the respondent's letter (exh. TM1) was addressed to the applicants only and not to all the residents of KSN because the meeting was made at the applicants' request and it was them who requested for the deferment of the enforcement of the eviction notices. The respondent acceded to their request. How could the respondent's decision be considered as unreasonable or irrational? The letter itself was clear and not vague. It stated that,

> .... Pegawai Daerah Petaling telah bersetuju untuk menangguhkan tindakan meroboh/mengosongkan rumah bangunan setinggan yang tuan wakili sahaja untuk tempoh satu bulan iaitu sehingga pada 5 Mac 1999.

Their delay tactics, as submitted by the counsel for the respondent was merely to gain a leverage and an attempt through the backdoor to get a higher compensation. The offers of compensation and purchase of low cost flats were done on compassionate and humanitarian grounds. Indeed the learned counsel for the applicants conceded that strictly in law, the respondent was under no obligation to provide alternative accomodation.

I am of the view that the letter was clear and unambiguous. The applicants could not be misled by it. The word, "sahaja" in the letter means that the extension was given to them alone and not to the other squatters. They requested for the postponement and they got what they wanted. There was

no evidence before me that they asked for a longer period or that the eviction notices be revoked. Nor was there any evidence that they had appealed to the respondent for a further extension beyond 5 March 1999 upon receipt of the respondent's decision. The letter did not state anywhere that the other squatters need not have to vacate the lands or that their houses would not be demolished. With respect, the learned counsel for the applicants was trying to interpret the letter by putting words which were not there to bolster his client's case. I am unable to see how the respondent's decision to defer enforcement of the eviction notices, made in favour of the applicants, arising directly from their own request could be said as irrational and unreasonable.

'Illegality' as a ground for judicial review was not canvassed before me.

(ii) Discrimination

The argument was again centred on the meaning which the applicant ascribed to the respondent's letter. They claimed that they had been discriminated because the respondent's decision in his letter (exh. TM1) was directed only to them and not to all the squatters of KSN. As such the other squatters need not have to vacate the lands or that their houses would not be demolished after 5 March 1999. The learned counsel for the applicants even ventured to suggest that Tanjunng Istimewa Sdn Bhd (TISB) to whom the lands were approved for alienation but had defaulted in payment of quit rents and premiums and MHDB, the developer who had advertised and constructed long houses on the lands were also trespassers. Being trespassers, they should also be issued with eviction notice and treated similary and not differently or favourably. Such discrimantion violates art. 8(1) of the Constitution which provides that all persons are equal before the law and are entitled to equal protection of the law. He cited *Ahmad Tajuddin v. Suruhanjaya Pelabuhan P. Pinang* [1997] 2 CLJ 225 as authority in respect of art. 8 of the constitution. The Court of Appeal in that case, in interpreting art. 8 of the Constitution followed, *PP v. Khong Teng Khen & Anor* [1976] 2 MLJ 166 where the Federal Court said:

> The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying persons for the purpose of legislation ... .
>
> All that Article guarantees is that a person in one class should be treated the same as another person of the same class ... .

The respondent, in his affidavit in reply deposed that the eviction notices dated 13 January 1999 had been issued to all the squatters of KSN and not to the applicants alone. To prove his point he exhibited 178 eviction notices dated 13 January 1999 (exh. SN3) issued to all the squatters of KSN. THat these notices were issued to all the squatters were not disputed by the applicants in their affidavit nor by their counsel at the hearing before me.

I found, on the facts before me that there was no discrimination within the meaning of art. 8(1) of the Constitution. The applicants and the other squatters were treated similarly and not differently. In fact they were better treated compared to the other squatters, who form the majority of the squatters in KSN. The respondent had been fair to the applicants. He heard them and acceded to their request for an extension of time. As far as TISB and MHDB were concerned, they could not, by any stretch of imagination be labelled as squatters and be put in the same class as the applicants. Nor were they trespassers. The longhouses were constructed with the knowledge and permission of the state authority. Section 425 of the Code makes it an offence only, if among others, any person occupies, or erects any building on any state land without lawful authority.

(iii) *Locus Standi*

The applicants contended that the respondent did not have the *locus standi* to make the impugned decision as the lands had been alienated to TISB. The learned counsel for the applicants conceded, quite rightly, that the lands remained state lands after reading the respondent's affidavit in reply. The respondent, had in his affidavit in reply stated that the approval for alienation of the lands to TISB had lapsed as it had defaulted in payment of premiums, which was one of the conditions when the state authority approved the lands for alienation. Being state lands, the respondent had the *locus standi* to make the impugned decision.

Even assuming that the learned counsel had made no concession on the issue of *locus standi* I am of the firm view that the respondent had the *locus standi* to deal with state lands. In this case, the lands remained state lands as no title had been issued to TISB. At all material times, the lands had not been registered in the name of TISB. Section 78(3) of the National Land Code makes it clear that the alienation of state land shall take effect upon the registration of a register document of title and notwithstanding that its alienation had been approved by the state authority, the land shall remain state land until that time.

As far as the applicants are concerned, they have no right in law and equity over state lands. Section 48 of the National Land Code prescribes that no title to state land shall be acquired by possession, unlawful occupation or occupation under any licence for, any period whatsoever.

In *Government of the State of Negeri Sembilan & Anor v. Yap Chong Lan & 12 Ors/Lesco Development Corp. Sdn Bhd v. Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123, Abdoolcader FJ, after referring to ss. 48 and 78(3) of the Code said (p. 128):

> These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity in the face of the specific legislative provisions of the Code *(Pemungut Hasil Tanah, Kota Tinggi UMBC* [1981] 2 MLJ 264).
>
> In *Sidek bin Hj. Muhamad & 461 Ors v. The Government of the State of Perak & Ors* [1982] 1 MLJ 313 three hundred and seventy seven squatters on state land sought for a declaration *inter alia* that they were entitled in law and equity to be in possession of their respective lots originally pioneered, opened up and occupied by them. Their action was struck off by the High Court under O. 18 r. 19 of the High Court Rules on the application by the defendants. The Federal Court dismissed their appeal and said (at p. 314):
>
> What equitable right or interest can be conjured up for the squatters who have illegally occupied state land? Squatters go into possession by, or as a result of, illegal occupation of state land. Illegal occupation of state land is an offence under section 425 of the National Land Code. It is well established that a Court of equity will never assist squatters to resist an order of possession illegally acquired: it will never intervene in aid of wrongdoers (see *Grafton v. Griffin* 39 ER 130). We would like to say this at once about squatters. The owner is not obliged to go to the Court to obtain an order of possession. He is entitled, if he so wishes, to take remedy into his own ands. He can go in himself and turn them out without the aid of the Court of Law. He can even use force, so long as he uses no more force then is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question.

The respondent's powers to deal with state lands are spelt out in s. 15 of the Code. Section 15(1) of the Code states that the State Director, the registrar and any Land Administrator may for the purposes of this Act:

(a) at all reasonable times have free access to, and enter upon any land in the state;

(g) exercise all other powers conferred on him by this Act, and all such powers ancillary or incidental thereto as may be resonably necessary to carry out the purpose of this Act.

Section 425 of the Code makes it an offence for any person, who without lawful authority, occupies, or erects any building on, any state land, reserved land or mining land. Section 426A of the Code empowers the Land Administrator without warrant, to arrest any person found committing or attempting to commit or abetting the Commission of an offence under s. 425 or 426 and to demolish, destroy or remove any building or take possession in the name of the State authority of any crop, erected or cultivated on any land in contravention thereof.

So, when the respondent issued the eviction notices and made the impugned decision he was merely exercising his powers under s. 15, in particular s. 15(1)(g) as the applicants had occupied the state lands and erected houses thereon illegally and without permission.

Is *Certiorari* A Proper Remedy?

The learned counsel for the respondent submitted that an order of *certiorari* is not normally issued where the applicants have an alternative remedy save only in very exceptional circumstances. See *Re Low See Kim* [1988] 2 CLJ 66, *Lim Kui Siam & Anor Representing Member of Persatuan Penduduk-penduduk Kawasan Hj. Manan, Kluang lwn. Pentadbir Tanah Daerah Kluang* [1995] 1 CLJ 846, *Manggai v. Government of Sarawak & Anor* [1970] 2 MLJ 41, *Kulawante (an infant) v. Government of Malaysia & Anor* [1978] 1 MLJ 92 and *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451.

In the instant case, the applicants have a right of appeal against the decision of the respondent if they were aggrieved by the said decision. Section 418 of the Code provides:

(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

(2) …

(3) In this section "decision" included any act, omission, refusal, direction or order.

The respondent's decision was on 5 February 1999. The applicants filed his *ex parte* application for leave for an order of *certiorari* on 22 February 1999. The time for appeal had not lapsed.

In *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451, the respondent applied for an order of *certiorari* to quash the notices of additional assessment for income tax for the years 1979 to 1984 inclusive. The High Court granted the respondent's application. The appellant's appealed against the decision. The issue posed to the court was whether *certiorari* would issue where there is an alternative remedy open to the respondent to appeal to the Special Commissioners of Income Tax under the Income Tax Act. The Supreme Court, in allowing the appeal said (p. 452):

> The first principle to note is that *certiorari* is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather that the final determination of individual rights. The jurisdiction is sometimes referred to as an "extraordinary" original jurisdiction of the High Court, supervisory in character rather that appellate or revisionary (see Professor Jain's *Administrative Law of Malaysia and Singapore*, page 360).
>
> There is said to be a subsidiary rule to the effect that *certiorari* is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.

The Supreme Court, after referring to various authorities on this issue then said (p. 455):

> A clear principle is reiterated here ie, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.
>
> In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the prosess of judicial reveiw. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exsists except in very exceptional cases.

This case was followed by the High Court in *Re Low See Kim* [1988] 2 CLJ 66. Lamin J, as he then was, refused leave to apply for an order of *certiorari* and held that "the remedy by way of judicial review is still a matter of discretion for the High Court but it will be available in only exceptional circumstances."

Another case in point is *Lim Kui Siam & Anor v. Pentadbir Tanah Kluang*, where Low Hop Bing JC as he was then was, followed the decision in *Government of Malaysia & Anor v. Jagdis Singh* and dismissed the applicants' application for leave to apply for an order of

certiorari to quash the decision of the Land Administrator who had issued eviction notices to the applicants, who were squatters on state lands, on the ground that it was the duty of the applicants to prove the existence of very exceptional circumstances in order to obtain leave from the court to issue *certiorari.*

The Court of Appeal in *Cheah Fong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 CLJ 242, followed *Government of Malaysia & Anor v. Jagdis Singh* when it affirmed the decision of the High Court which dismissed the appellant's application for a declaration, holding that as a matter of judicial policy, the normal rule is not for the court to intervene but to allow the domestic tribunal to proceed and decide on the matter. Further, the Court of Appeal said that the appellant's application was premature as he could appeal to the Appeal Board against the decision of the respondent.

The learned counsel for the applicants replied that the existence of a statutory right of appeal did not preclude them from applying for an order for *certiorari*. He referred to the Court of Appeal's decision in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85. In that case, the applicant applied for leave for an order of *certiorari* to quash the Notice of Cancellation of Entry Permit issued by the Director of Immigration, Sabah. Sulaiman Hashim J granted the leave despite of the provision in s. 14(5) of the Immigration Act allowing an aggrieved person to appeal to the minister and another provision in s. 59A of the Act which enacts that there shall be no judicial review in any court of law. Ian Chin J, who heard the substantive motion, however dismissed the application for an order of *certiorari*, holding, *inter alia,* that the ouster clause in s. 59A applied to acts done or decisions made by the Director of Immigration, Sabah. The applicant appealed. The Court of Appeal allowed the appeal and held, *inter alia,* that s. 59A of the Act did not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds. An ouster clause in a statute, in any case, immunised from judicial review only those administrative acts and decisions that were not infected by an error of law.

There is no doubt that the court may, in appropriate cases, grant judicial review notwithstanding the availability of an independent remedy. See for example *Majlis Perbandaran Pulau Pinang v. Syarikat Kerjasama Serbaguna Sg. Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 where the Federal Court had illustrated a variety of situations in which the courts had granted judicial review despite of the existence of an appeal remedy.

It is often said that judicial review is concerned not with the decision but the decision making process: See *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155. The law however does not remain static. The Court of Appeal in *Sugumar*'s case held, following the Federal Court's decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, that judicial review was no longer only concerned with the decision making process but also with the decision itself. The duty to act fairly now comprises of two limbs, namely procedural fairness and substantive fairness. It follows that a decision may be struck down as being contrary to substantive principles. In referring to the facts of that case, Gopal Sri Ram JCA, at p. 102, said,

> In the circumstances of this case, the remedy of an appeal was for obvious reasons, certainly not equally efficacious as *certiorari*. The appellant was given a mere seven days to leave Sabah. The time afforded him was hardly sufficient for him to make arrangements in respect of the practice he had built up over many years. Serious injury to the appellants's livelihood was imminent. An appeal to the Minister would not have been decided upon within the seven day period afforded the appellant. Futher, the Act does not provide for a stay of a decision pending appeal to the Minister. It meant that the appellant would have to remove himself from the State of Sabah while awaiting the outcome of the appeal.

The learned counsel for the applicants submitted that the exceptional circumstances which existed in *Sugumar*'s case were similar to the circumstances in the instant case. The applicants applied for an order of *certiorari* instead of appealing because it would be more efficacious as an appeal would take a longer time to dispose of the matter. Further, there is no provision in the National Land Code for a stay of the respondent's decision. He did, however conceded before me that an application for a stay of the impugned decision could be made to the court immediately upon filing an appeal under s. 418 of the Code. It is clear that O. 53 r. 1(5) of the Rules of the High Court 1980 does not provide for an automatic stay. Order 53 r. 1(5) states that the grant of leave shall operate as a stay of the proceeding in question "if the court of judge so directs."

The learned counsel for the respondent submitted that on the facts of this case, there were no really exceptional circumstances to justify the court, in exercise of its discretion, to grant an order of *certiorari* to quash the respondent's decision. I agree. The applicants should have appealed against the respondent's decision under s. 418 of the Code rather then resorting to judicial review in absence of very exceptional circumstances. Except for the fact that there is no provision for a stay of the respondent's decision in the Code, the rest of the facts in *Sugumar*'s case, are distinguishable.

In *Sugumar*'s case, the notice of cancellation of the entry permit became effective as soon as it was served. The words used in the notice states, "... hereby forthwith cancel the entry permit issued to you ...". It was served on him on 12 December 1997. On the same day he was issued with a special pass valid only for seven days, at the end of which he had to leave Sabah, giving him hardly sufficient time to make arrangement for his law practice. An appeal to the Minister would not have been decided upon within the seven day period. Such was the urgency of the situation in that case. In our case, the applicants were given sufficient time to vacate the state lands. First, they had 14 days to vacate the state lands from the date of the eviction notices. Upon their own request to the respondent, the applicants were later given one month extension beginning from 5 February 1999 and expiring on 5 March 1999. The applicants had ample time to appeal to the High Court against the respondent's decision and thereupon, apply for a stay pending the outcome of the appeal. They were even offered compensation and an alternative accomodation pending the completion of low cost flats which they initially accepted, only to change their minds later because they preferred flats in Bt. Jelutong and not in Bt. Subang.

Another distinguishing fact is that the applicant in *Sugumar*'s case had entered Sabah legally whereas in our case, the applicants occupied the state lands illegally and without permission. As Raja Azlan Shah CJ in *Sidek bin Hj. Mohamed & Ors v. Government of Perak* [1982] CLJ 244 aptly said at p. 244:

> Squatters have no right either in law or in equity.

The court is not unmindful of the views expressed in *Sugumar*'s case and *Majlis Perbandaran Pulau Pinang*'s case that the remedy of *certiorari* is more efficacious and speedier that that of an appeal, but in the circumstances of this case, bearing in mind that:

(i) the applicants had more than one month to appeal to the High Court after service of the eviction notices and thereupon to apply for a stay, if necessary;

(ii) the *ex parte* application for leave to apply for an order of *certiorari* was filed only on 22 February 1999 ie, about 11 days before the deadline set by the respondent;

(iii) the applicants were offered compensation and alternative accomodation and indeed accepted the offers, according to their own evidence, from their own affidavit but changed their minds later as they preferred to be in Bt Jelutong and not in Bt. Serdang Sg. Buluh.

(iv) the applicants occupied state lands illegally;

(v) a court of equity will not intervene in aid of wrongdoers;

the contention that the remedy by way of *certiorari* was more efficacious than by way of an appeal was not convincing enough and did not carry much weight.

The learned counsel for the respondent also contended that the applicants were guilty of non-disclosure of material or relevant facts when they applied for leave to issue an order of *certiorari*. This was denied by the applicants. I did not think that it was necessary for me to decide on this point in order to dispose of the applicant's application.

Before I conclude, I have one general observation to make. There is no hard and fast rule as at what stage the issue on the availability of an alternative remedy should be dealt with: see *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Sg. Gelugor Dengan Tanggungan* but ideally it would be preferable if this issue is ventilated first before the parties proceed to other issues. Ordinarily the court is not in the best position to anticipate precisely in every case the issues that the parties may raise in the course of the hearing.

For reasons as stated above, I regretfully dismissed the applicants' application for an order of *certiorari* with costs.